



State of Wisconsin  
2003 - 2004 LEGISLATURE

LRB-0131/P2

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Gen. Cat.

1 AN ACT ~~to repeal~~ 30.01 (6b), 30.02, 30.025, 30.03 (title), 30.03 (3), 30.10 (title)  
2 and (1) to (3), 30.10 (4) (title), 30.10 (4) (c), 30.105, 30.12 (3) (d), 30.12 (4) (title),  
3 30.123 (5), 30.126 (10) (title), (a) (title) and (b) (title), 30.13 (3) (title), 30.13 (6)  
4 (title), 30.14 (title), 30.14 (1) (title), 30.15 (title), 30.15 (1) (title), 30.18 (3) (title)  
5 and (a) (title), 1. and 2., 30.18 (3) (a) 4., 30.18 (3) (b), 30.18 (9), 30.19 (1m) (c) and  
6 (d), 30.19 (2) (intro.) and (a) to (d), 30.19 (2) (f), 30.19 (3) (title), 30.19 (3) (b),  
7 30.195 (4) and (7), 30.20 (1) (c) 1., 30.2035, 30.21 (3) (b) and 30.292; **to**  
8 **renumber** 30.01 (1b), 30.01 (1m), 30.01 (1t), 30.01 (3e), 30.01 (3m), 30.01 (3s),  
9 30.01 (6d), 30.01 (7m), 30.01 (9), 30.01 (10), 30.10 (4) (d), 30.103, 30.11 (title),  
10 30.11 (6), 30.12 (3) (bt) 1. to 8., 30.12 (3) (bt) 9., 30.12 (4) (d), 30.121 (title), (2)  
11 and (3), 30.121 (3g), 30.121 (3m), 30.121 (3r), 30.121 (5) and (6), 30.121 (7),  
12 30.1255, 30.13 (6), 30.133, 30.14 (1), 30.15 (1) (intro.) and (a) to (c), 30.15 (3),  
13 30.16, 30.18 (6) (d) (title), 30.2037, 30.205, 30.21 (title), (1), (2) and (3) (title),  
14 30.21 (3) (a), 30.24, 30.25, 30.26, 30.265, 30.27, 30.275, 30.277, 30.29, 30.294,  
15 30.298 (title), 30.298 (4), subchapter III (title) of chapter 30 [precedes 30.30],

30.32, 30.33 and subchapter IV (title) of chapter 30 [precedes 30.40]; **to**  
**renumber and amend** 30.015, 30.027, 30.03 (2), 30.03 (4) (a), 30.03 (4) (b),  
30.05, 30.056, 30.06, 30.07 (title), 30.07 (1) (a), 30.07 (1) (b), 30.07 (2), 30.10 (4)  
(a), 30.10 (4) (b), 30.11 (1) to (4), 30.11 (5), 30.12 (3) (bt) (intro.), 30.12 (4) (a),  
30.12 (4) (b), 30.12 (4) (c), 30.12 (4) (e), 30.12 (4) (f), 30.12 (4m), 30.12 (5), 30.121  
(4), 30.122, 30.123 (1), 30.124, 30.126 (title) and (2) to (9), 30.126 (10), 30.13 (3),  
30.131, 30.14 (2), 30.15 (1) (d), 30.18 (3) (a) 3., 30.18 (6) (b), 30.18 (6) (c), 30.18  
(6) (d), 30.18 (8), 30.19 (1) (intro.), 30.19 (1) (a), 30.19 (1) (b), 30.19 (1) (c), 30.19  
(2) (e), 30.19 (3) (a), 30.19 (4), 30.195 (3), 30.196, 30.20 (1) (c) 2., 30.20 (1) (c) 3.,  
30.20 (1) (d), 30.20 (2) (c), 30.202, 30.2025, 30.2026, 30.203, 30.204, 30.206,  
30.207, 30.28, 30.298 (1), (2) and (3), 30.298 (5), 30.30, 30.31, 30.34, 30.35, 30.37  
and 30.38; **to amend** 25.29 (1) (a), 28.11 (12), subchapter II (title) of chapter 30  
[precedes 30.035], 30.12 (title), 30.12 (1) (intro.), 30.12 (1) (a), 30.12 (1) (b), 30.12  
(3) (bn), 30.12 (3) (c), 30.123 (title), 30.123 (2), 30.123 (3), 30.123 (4), 30.13 (title)  
and (1) (intro.), (b) and (c), 30.13 (1m) (intro.) and (b), 30.13 (4) (b), 30.13 (4) (c),  
30.135 (1) (a) (intro.) and 2., 30.135 (2) (a) and (4), 30.18 (2) (a) (intro.), 30.18  
(2) (b), 30.18 (4) (title), 30.18 (4) (a), 30.18 (4) (b), 30.18 (5) (a) (intro.), 30.18 (5)  
(a) 1., 30.18 (5) (a) 2., 30.18 (5) (b), 30.18 (6) (title), 30.18 (6) (a), 30.18 (6m) (a)  
(intro.), 30.18 (6m) (a) 1. and 2., 30.18 (6m) (b), 30.18 (6m) (c), 30.18 (7), 30.19  
(1m) (intro.), 30.19 (1m) (a), 30.19 (1m) (b), 30.19 (1m) (e), 30.19 (5), 30.195 (1),  
30.20 (1) (a), 30.20 (1) (b), 30.20 (2) (title), (a) and (b), 60.782 (2) (d), 66.0133 (3),  
281.35 (1) (b) 2., 281.35 (4) (a) 1., 281.35 (4) (b) (intro.), 293.65 (2) (a) and 293.65  
(2) (b); **to repeal and recreate** subchapter I (title) of chapter 30 [precedes  
30.01], 30.12 (2), 30.12 (3) (a) (intro.), 30.12 (3) (b), 30.12 (5) (title), 30.18 (5)  
(title), 30.195 (2) and 30.20 (1) (title); and **to create** 30.01 (1h), 30.01 (1hm),

→ This is a preliminary draft. An analysis will be provided in a later version.

1 30.01 (1mp), 30.01 (1nq), 30.035, 30.04, 30.08, 30.12 (1m), 30.12 (3) (a) 9., 30.12  
2 (3) (br), 30.12 (5) (a), 30.123 (6), 30.18 (1) (intro.), 30.18 (1) (b), 30.18 (2) (a) 3.,  
3 30.18 (2) (c), 30.18 (3m) (intro.), 30.18 (3m) (b), 30.18 (4) (am) 1. and 2., 30.18  
4 (5) (a) 1m., 30.18 (5) (a) 3., 30.18 (6) (cm) 3., 30.18 (6) (cm) 3., 30.19 (1b), 30.19  
5 (3b), 30.19 (4) (a), 30.213 (title), 30.215, 30.243 (3) (c), 30.245, 30.253, 30.263  
6 (title) and (1) (title), 30.266 (1) (intro.), 30.323 (title), 30.327 (title), 30.341 (title)  
7 and 30.341 (1) of the statutes; **relating to:** recodification of chapter 30  
8 (B) I [\*\*\*\*NOTE more to be added later].

### Analysis by the Legislative Reference Bureau

PREFATORY NOTE: This bill contains the final recommendation of the joint legislative council's special committee on navigable waters recodification. The special committee was charged by the joint legislative council with recodifying ch. 30, in order to update language and make technical corrections in ch. 30. The special committee determined that the following portions of ch. 30 merit recodification:

- Subch. I (definitions)
- Subch. II (regulation of structures, deposits, dredging, and other activities that affect navigable waters)
- Subch. V (boating)

This bill creates a new subch. VI for penalties and enforcement provisions that apply to the entire chapter.

The other 2 subchapters in ch. 30 are not recodified. This bill relocates subch. III (harbors) to make room for the renumbered provisions in subch. II, but makes no other changes in either subch. III (harbors) or subch. IV (Lower Wisconsin State Riverway).

The changes made by this bill ~~draft~~ to current statutes are described in detailed notes throughout this bill. In addition, the report to the legislature regarding this bill contains background information, a summary of special committee discussions, and a bibliography of information prepared for and submitted to the special committee. The remainder of the prefatory note contains a brief summary of the key provisions of this bill.

### NAVIGABLE WATERS REGULATION

The bill:

Reorganizes all of the statutes that provide for permits or approvals under subch. II of ch. 30, so that these statutes are in a consistent format, use consistent terminology and have consistent decision-making standards where appropriate.

Requires the department of natural resources (DNR) to develop and make publicly available maps and data that show the results of its determinations of navigability.

Directs the DNR to develop rules that describe the methods it uses for making determinations of navigability.

Requires DNR to promulgate rules that describe the public interest and public rights and the rights of riparian owners for purposes of decisions to approve or deny permits and approvals affecting navigable waters under subch. II of ch. 30.

INVS. 3-8.5  
(fr. p. 5)

(X)

Codifies the supreme court cases that set forth the kinds of evidence that can be used to determine if a lake or stream is navigable.

Modifies provisions regarding farm drainage ditches to provide an exemption from regulation, rather than an exemption from the definition of “navigable”, and clarifies the exemption so that it only applies to projects for an agricultural purpose.

Creates a procedure to request a hearing if the DNR issues an order modifying or rescinding a permit or contract.

Authorizes DNR to issue a permit for a deposit in navigable waters if, among other things, the deposit will promote public rights and interests in navigable waters.

Authorizes additional “short form” permits to simplify the approval process for several of the permit statutes.

Modifies the current notice and hearing process by allowing the DNR to issue a denial directly after receiving a complete permit or contract application.

Requires a person who wishes to challenge a permit or contract in a contested case hearing to make a more detailed showing of the facts and legal standards that support the objection, and requires DNR to find that those facts raise a reasonable doubt that the project, as proposed, complies with the applicable standards in subch. II.

Authorizes mediation between the applicant and persons with an interest in a permit or contract if the applicant, DNR and the other interested parties agree to this process.

#### STATE BOATING REGULATION

The bill:           e          

Eliminates the authority of DNR to change statutory regulations by administrative rule in order to conform to federal regulations; and requires DNR to submit legislation to conform statutes to federal regulations.

Consolidates and makes consistent the provisions regarding equipment and operation of patrol boats.

Updates references to activities that involve being towed behind a boat.

Updates federal cross-references that are incorrect, and adds federal cross-references where current statutes have a nonspecific reference to federal law.

Extends the current prohibition on retail sale of a boat made in this state that does not comply with noise limits so that this prohibition also applies to retail sale of boats made elsewhere.

Creates a statutory exemption from the requirement to carry a personal flotation device for racing shells, sculls, kayaks and canoes, to duplicate the current exemption in federal law.

Authorizes but does not require that a parent or guardian be liable for a minor's actions in boat operation; violations by a minor are currently deemed to be a violation by the parent or guardian.

Permits operation of a boat within 100 feet from a skin diver's flag or swimmer if there is not sufficient room beyond 100 feet from the flag to maneuver, but boat operation may not exceed slow-no-wake speed.

#### LOCAL BOATING REGULATION

The bill:           e          

Authorizes a town, village, or city to enact boating ordinances of clearly local concern, even if another local governmental unit (county, lake district, or town sanitary district) has adopted an ordinance applicable to the same lake or stream.

Expands county authority so that a county may enact boating ordinances for an inland lake if authorized to do so by the towns, villages, or cities surrounding the lake or if those towns, villages, or cities do not enact a boating ordinance.

Provides that counties may enact boating ordinances for outlying waters contiguous to the county.

Lists state boating regulations that require strict conformity in local ordinances and sets standards for other local ordinances which are required by statute to be consistent with state regulations.

Expands the scope of DNR review so that it applies to all local boating ordinances.

Authorizes a sheriff or a town, village, or city to issue emergency regulations applicable to boating.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 25.29 (1) (a) of the statutes is amended to read:

2           25.29 (1) (a) Except as provided in ss. 25.293 and 25.295, all moneys accruing  
3           to the state for or in behalf of the department under chs. 26, 27, 28, 29, 169, and 350,  
4           subchs. I and VI of ch. 77, and ss. 23.09 to 23.31, 23.325 to 23.42, 23.50 to 23.99, 30.50  
5           to ~~30.55~~ 30.578, 70.58, 71.10 (5), 71.30 (10), and 90.21, including grants received from  
6           the federal government or any of its agencies except as otherwise provided by law.

7           **SECTION 2.** 28.11 (12) of the statutes is amended to read:

8           28.11 (12) **ENFORCEMENT.** If at any time it appears to the department that the  
9           lands are ~~not~~ being managed in accordance with violation of this section it, the  
10          department shall so advise the county forestry committee and the county clerk. If  
11          the condition persists, the department may proceed against the persons responsible  
12          for ~~such noncompliance under s. 30.03 (4)~~ the possible violation by ordering a hearing  
13          under ch. 227. The department may request that the hearing examiner issue an  
14          order directing the responsible persons to perform or refrain from acts in order to  
15          fully protect the county forest lands. If any person fails or neglects to obey an order,  
16          the department may request the attorney general to institute proceedings for the  
17          enforcement of the order in the name of the state. The proceeding shall be brought  
18          in the manner and with the effect of proceedings under s. 111.07 (7). No penalty may  
19          be imposed for violating a hearing examiner's order under this subsection, but the

1 violation of a judgment enforcing the order may be punished in civil contempt  
2 proceedings.

3 **SECTION 3.** Subchapter I (title) of chapter 30 [precedes 30.01] of the statutes  
4 is repealed and recreated to read:

5 **CHAPTER 30**

6 **SUBCHAPTER I**

7 **DEFINITIONS**

8 **SECTION 4.** 30.01 (1b) of the statutes is renumbered 30.18 (1) (a).

9 **SECTION 5.** 30.01 (1h) of the statutes is created to read:

10 30.01 (1h) “Contested case” has the meaning given in s. 227.01 (3).

11 **SECTION 6.** 30.01 (1hm) of the statutes is created to read:

12 30.01 (1hm) “Contested case hearing” means a hearing of a contested case.

13 **SECTION 7.** 30.01 (1m) of the statutes is renumbered 30.50 (3m).

NOTE: The definition of “designated mooring area” is moved to the boating  
subchapter, where that term is used.

14 **SECTION 8.** 30.01 (1mp) of the statutes is created to read:

15 30.01 (1mp) “Division of hearings and appeals” means the division of hearings  
16 and appeals in the department of administration.

17 **SECTION 9.** 30.01 (1nq) of the statutes is created to read:

18 30.01 (1nq) “Environmental pollution” has the meaning given in s. 299.01 (4).

19 **SECTION 10.** 30.01 (1t) of the statutes is renumbered 30.266 (1) (a).

NOTE: The definition of “flotation device” is relocated to s. 30.266, where the term  
is used.

20 **SECTION 11.** 30.01 (3e) of the statutes is renumbered 30.50 (5g).

NOTE: The definition of “mooring” is relocated to the boating statutes, where the  
term is used.

21 **SECTION 12.** 30.01 (3m) of the statutes is renumbered 30.50 (5m).

NOTE: The definition of “mooring anchor” is moved to the boating statutes, where the term is used.

1       **SECTION 13.** 30.01 (3s) of the statutes is renumbered 30.50 (5r).

NOTE: The definition of “mooring buoy” is moved to the boating statutes, where the term is used.

2       **SECTION 14.** 30.01 (6b) of the statutes is repealed.

NOTE: The definition of “substantive written objection” is repealed. This term is used in s. 30.135, regarding water ski platforms and water ski jumps: a substantive written objection is required to obtain a contested case hearing to challenge issuance of a permit for these structures. However, the DNR determines by rule the reasons that will support a substantive written objection under s. 30.135, making the definition unnecessary for purposes of that section. The only other use of this term is in the general notice and hearing provisions of current s. 30.02, which are substantially modified in this bill and moved to s. 30.245. The new notice and hearing provision contains additional requirements for objections to a permit or approval that are sufficient to obtain a contested case hearing, rendering this definition unnecessary for purposes of the general notice and hearing provision.

3       **SECTION 15.** 30.01 (6d) of the statutes is renumbered 293.01 (27m).

NOTE: The definition of “surplus water” is only used in s. 30.18. The substance of this definition is incorporated into s. 30.18 (5) (a) 2. The definition is moved to the chapter dealing with metallic mining, where the definition is used by cross-reference.

4       **SECTION 16.** 30.01 (7m) of the statutes is renumbered 30.18 (1) (c).

NOTE: The definition of “water loss” is relocated to s. 30.18, where the term is used.

5       **SECTION 17.** 30.01 (9) of the statutes is renumbered 30.18 (1) (d).

NOTE: The definition of “withdrawal” is relocated to s. 30.18, where that term is used.

6       **SECTION 18.** 30.01 (10) of the statutes is renumbered 30.266 (1) (b).

NOTE: The definition of “Wolf River municipality” is relocated to where that term is used. The new numbering of this statute is s. 30.266 as proposed by this bill.

7       **SECTION 19.** 30.015 of the statutes is renumbered 30.251 and amended to read:

8       **30.251 Time limits for issuing permit determinations.** In issuing permits  
9       under this ~~chapter~~ subchapter, the department shall initially determine whether a  
10       complete application for the permit has been submitted and, no later than 60 days  
11       after the application is submitted, notify the applicant in writing about the initial  
12       determination of completeness. If the department determines that the application  
13       is incomplete, the notice shall state the reason for the determination and the specific

1 items of information necessary to make the application complete. An applicant may  
2 supplement and resubmit an application that the department has determined to be  
3 incomplete. There is no limit on the number of times that an applicant may resubmit  
4 an application that the department has determined to be incomplete under this  
5 section. The department may not demand items of information that are not specified  
6 in the notice as a condition for determining whether the application is complete  
7 unless both the department and the applicant agree or unless the applicant makes  
8 material additions or alterations to the project for which the application has been  
9 submitted.

10 **SECTION 20.** 30.02 of the statutes is repealed.

NOTE: Section 30.02 contains the provisions for notice of hearing under ch. 30. These provisions are repealed here and recreated, in substantially modified form, in s. 30.245.

11 **SECTION 21.** 30.025 of the statutes is repealed.

NOTE: The procedure in s. 30.025 substantially duplicates the procedure in s. 196.491 (3). It appears that the procedure in s. 196.491 (3) is used rather than the procedure in s. 30.025, so the latter procedure is repealed.

12 **SECTION 22.** 30.027 of the statutes is renumbered 30.255 and amended to read:

13 **30.255 Lower Wisconsin State Riverway.** For activities in the Lower  
14 Wisconsin State Riverway, as defined in s. 30.40 (15), ~~no person obtaining the~~  
15 department shall include a condition in a permit <sup>issued</sup> ~~under subchs. I, subch. ☒ II or V~~  
16 that the person obtaining the permit may not start or engage in the activity for which  
17 the permit was issued unless the person obtains any permit that is required for the  
18 activity under s. 30.44 or 30.445.

NOTE: The only permits under subch. V are for motorboat races and moorings. Neither of these activities appear to require a permit under s. 30.44 or 30.445. Therefore, the reference to subch. V is deleted.

This provision is rewritten as a permit condition for a permit issued under ch. 30. This shifts the burden to DNR to condition its issuance of a ch. 30 permit upon obtaining any additional permit that may be required if the activity is located in the Lower Wisconsin State Riverway.



1           **SECTION 23.** 30.03 (title) of the statutes is repealed.

2           **SECTION 24.** 30.03 (2) of the statutes is renumbered 30.97 and amended to read:

3           **30.97 Enforcement of forfeitures; abatement of nuisances.** The district  
4 attorney of the appropriate county or, at the request of the department, the attorney  
5 general shall institute proceedings to recover any forfeiture imposed or to abate any  
6 nuisance committed under this chapter ~~or ch. 31~~.

NOTE: This bill deletes the cross-reference to ch. 31 and replicates current s. 30.03  
(2) as s. 31.93.

~~\*\*\*NOTE: Should the reference in s. 30.97 be to "subchapter" instead of "chapter"?~~

7           **SECTION 25.** 30.03 (3) of the statutes is repealed.

NOTE: The current text of s. 30.03 (3) is as follows: "All forfeitures shall be  
recovered by civil action as provided in ch. 778 and when collected shall be paid directly  
into the state treasury". This provision is unnecessary.

8           **SECTION 26.** 30.03 (4) (a) of the statutes is renumbered 30.96 (1) and amended  
9 to read:

10           **30.96 (1)** If the department learns of a possible violation of the statutes relating  
11 to navigable waters or a possible infringement of the public rights relating to  
12 navigable waters, and the department determines that the public interest may not  
13 be adequately served by imposition of a penalty or forfeiture, the department may  
14 proceed as provided in this ~~paragraph~~ subsection, either in lieu of or in addition to  
15 any other relief provided by law. The department may order a hearing under ch. 227  
16 concerning the possible violation or infringement, and may request the hearing  
17 examiner to issue an order directing the responsible parties to perform or refrain  
18 from performing acts in order to fully protect the interests of the public in the  
19 navigable waters. If any person fails or neglects to obey an order, the department  
20 may request the attorney general to institute proceedings for the enforcement of the

department's order in the name of the state. The proceedings shall be brought in the manner and with the effect of proceedings under s. 111.07 (7).

**SECTION 27.** 30.03 (4) (b) of the statutes is renumbered 30.96 (2) and amended to read:

30.96 (2) No penalty may be imposed for ~~violation of~~ violating a hearing examiner's order under this ~~subsection~~ section, but the violation of a judgment enforcing the order may be punished in civil contempt proceedings.

\*\*\*\*NOTE: In later draft, check how procedures in s. 30.03 (4) (a) and (b), as well as s. 28.11 (12), mesh with other procedural changes in draft.

**SECTION 28.** Subchapter II (title) of chapter 30 [precedes 30.035] of the statutes is amended to read:

## CHAPTER 30

### SUBCHAPTER II

#### NAVIGABLE WATERS AND NAVIGATION IN GENERAL

**SECTION 29.** 30.035 of the statutes is created to read:

(15) (B) (3) 30.035 Determinations of navigability; maps and data. The department shall develop, and make publicly available, maps and data that show the results of determinations of navigability that are made by the department. At a minimum, the maps and data shall include navigability determinations made after the effective date of this ~~section~~ <sup>subsection</sup> .... [revisor inserts date]. To the extent practicable, the department shall incorporate past determinations of navigability into the maps and data.

material from p. 15  
Ins. 10-14A

No (B)

material from  
p. 16  
10-14B

\*\*\*\*NOTE: I took out the phrase "within the constraints of available staff and funds" in s. 30.035(3) given the use of the phrase "To the extent practicable."

**SECTION 30.** 30.04 of the statutes is created to read:

material from p. 16  
to p. 18 10-14C

1           **30.04 Rule-making.** (1) The department shall promulgate rules that  
2 describe all of the following:

3           (a) The standards in common law and statutes for determining whether a body  
4 of water is a lake or stream.

5           (b) The methods used by the department for making determinations of whether  
6 a lake or stream is navigable under s. <sup>30.035 ✓</sup>~~30.08~~.

7           (c) The public interest and public rights and the rights of riparian owners in  
8 navigable waters.

9           (d) The methods for evaluating how an activity or structure regulated under  
10 this subchapter may promote or be detrimental to the public interest and public  
11 rights in navigable waters and to the rights of riparian owners.

12           (e) The methods for evaluating how an activity or structure regulated under  
13 this subchapter may materially obstruct navigation or materially reduce the flood  
14 flow capacity of a stream.

15           (f) The specific reasons that will support a substantive written objection.

16           (g) The kinds of scientific evidence that may be used to show that a farm  
17 drainage ditch was a navigable stream before ditching for purposes of s. 30.215.

18           (2) The department shall promulgate rules that specify the local governmental  
19 units that are required to receive notice under this subchapter, where any procedure  
20 in this subchapter requires notice to a local governmental unit. At a minimum,  
21 notice shall be provided to the following local governmental units, if the project or  
22 activity that is subject to the requirement of a permit or approval, an order, or a  
23 hearing is located in the local governmental unit:

24           (a) The clerk of a municipality.

25           (b) The secretary of a town sanitary district.

(c) The secretary of a public inland lake protection and rehabilitation district.

(d) The secretary of a county drainage board.

(3) Any reference to this subchapter includes any rules promulgated under this subchapter, and any reference to any provision of this subchapter includes any rules promulgated under that provision.

\*\*\*\*NOTE: Section 30.04 (3) uses the language used in s. 29.014 (2) (c). OK?

NOTE: The new requirement for rules related to navigable waters, in sub. (1), above, is described in the note following s. 30.08, which is created by this bill.

<sup>30.035 ✓</sup>  
SECTION 31. 30.05 of the statutes is renumbered 30.233 and amended to read:

**30.233 Applicability of chapter to municipally-owned submerged shorelands subchapter to lake beds or stream beds under the jurisdiction of a municipality.** Nothing in this ~~chapter~~ subchapter relative to the establishment of bulkhead or pierhead lines or the placing of structures or deposits in navigable waters or the removal of materials from the beds of navigable waters ~~is applicable to submerged shorelands in Lake Michigan~~ applies to any lake bed, the title to which has been granted by the state to a municipality or to any stream bed which the legislature has authorized a municipality to occupy.

NOTE: This statute is amended to apply to other lakes in which lake bed grants have been made and to authorization to occupy portions of a stream bed.

SECTION 32. 30.056 of the statutes is renumbered 30.261 and amended to read:

**30.261 ~~Exemption from certain permit requirements~~** <sup>Crayfish Creek</sup> Notwithstanding ss. 30.12, 30.19, 30.195, and ~~30.294~~ 30.975, the city of Oak Creek may not be required to remove any structure or concrete or other deposit that was placed in Crayfish Creek in the city of Oak Creek before June 1, 1991, and may continue to maintain the structure, concrete, or deposit without having a permit or other approval from the department.

SECTION 33. 30.06 of the statutes is renumbered 30.331 and amended to read:

(Federal concurrent jurisdiction; waivers)

1           **30.331** ~~Waiver of certain provisions of this chapter subchapter.~~ <sup>Under</sup> The  
2 department, by rule, may waive the applicability to specified navigable waters of the  
3 United States of all or part of those provisions of this ~~chapter subchapter~~ which relate  
4 to the establishment of bulkhead or pierhead lines or the placing of structures or  
5 deposits in navigable waters or the removal of materials from the beds of navigable  
6 waters. The department may promulgate such the rule only after it the department  
7 has entered into an ~~agreement~~, with the appropriate federal agency wherein it is  
8 agreed, an agreement that requires that the comparable federal law will be enforced  
9 on the waters in question in lieu of the state law ~~which~~ that is being waived. The  
10 objective of such the agreement shall be to avoid duplication of administration with  
11 respect to navigable waters over which this state and the U.S. federal government  
12 have concurrent jurisdiction, in those situations wherein administration by a single  
13 governmental agency will tend to avoid confusion and the necessity of obtaining  
14 permits from both the state and federal governments by those who are subject to the  
15 law and at the same time will adequately protect the public interest. The agreement  
16 may contain such further provisions as are designed to achieve this objective.

17           **SECTION 34.** 30.07 (title) of the statutes is renumbered 30.257 (title) and  
18 amended to read:

19           **30.257** (title) ~~Limits and conditions~~ Time limits for permits and  
20 contracts.

21           **SECTION 35.** 30.07 (1) (a) of the statutes is renumbered 30.257 (1) and amended  
22 to read:

23           30.257 (1) Except as provided in ~~par. (b)~~ sub. (2), every permit or contract issued  
24 under ss. ~~30.01 to 30.29~~ this subchapter for which a time limit is not provided by s.

1 30.20 (2) or (3) is void unless the project is completed within 3 years after the permit  
2 or contract was issued.

3 **SECTION 36.** 30.07 (1) (b) of the statutes is renumbered 30.257 (2) and amended  
4 to read:

5 30.257 (2) The department may specify a time limit of less than 3 years for a  
6 permit or contract issued under ss. 30.01 to 30.29 this subchapter. For good cause,  
7 the department may extend the time limit for a permit or contract issued under ss.  
8 30.01 to 30.29 this subchapter for no longer than 2 years if the grantee requests an  
9 extension prior to expiration of the initial time limit.

10 **SECTION 37.** 30.07 (2) of the statutes is renumbered 30.249 and amended to  
11 read:

12 **30.249 Modification or rescission of a permit or contract.** For good  
13 cause, the department may issue an order to modify or rescind any permit or contract  
14 issued under ss. 30.01 to 30.29 this subchapter before its expiration. The department  
15 shall schedule a contested case hearing on the order if the holder of the permit or  
16 contract objects in writing to the proposal to modify or rescind the permit or contract,  
17 and the department receives the objection within 30 days after providing notice of  
18 its proposal to the holder of the permit or contract. The department shall give notice  
19 of the hearing to each local governmental unit as required under s. 30.04 (2). If a  
20 hearing is scheduled, the division of hearings and appeals shall mail a written notice  
21 at least 10 days before the hearing to the holder of the permit or contract and to each  
22 person receiving notice of the department's proposal.

NOTE: Procedures are added related to modifying or rescinding a permit or contract in order to provide explicitly that the holder of any permit or contract must receive due process in such proceedings.

\*\*\*\*NOTE: MGG-Review above language to see if it works.

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~~SECTION 38.~~ 30.08 of the statutes is created to read:

30.035

~~30.08~~ **Navigability.** (1) DETERMINATION OF NAVIGABILITY. (a) The department

may determine that a natural body of water is navigable only by actual navigation

as provided in par. (b), by using measurements or calculations as provided in par. (c), \*\*\*

or by basing the determination on reliable records that show a history of actual navigation.

(b) The department shall determine that a body of water is navigable if the department finds that the body of water is capable of floating any boat, skiff, or canoe that is of the shallowest draft and that is used for recreational purposes. The department may determine the body of water to be navigable even though any of the following applies:

1. It is necessary to drag or carry the boat, skiff, or canoe over occasional areas of shallow water or occasional obstructions.

2. The conditions of navigability are present only in regularly recurring periods of high water, so long as the periods of high water are of sufficient duration to allow recreational use.

3. The conditions of navigability are the result of natural or artificial conditions, if the natural or artificial conditions are of long standing.

(c) The department may determine whether a stream is navigable in fact based on measurements or calculations that predict, to a reasonable scientific certainty, the existence of water in the stream sufficient to allow actual navigation as required for a determination of navigability under par. (b).

(2) SCOPE. A determination by the department that a natural body of water is navigable under this section applies to any enlargement or improvement to that body of water.

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\*\*\*\*NOTE: Mark - I deleted the statement regarding determinations of navigability in sub. (1) since it was in the passive voice. Who can determine a body of water to be navigable besides DNR? The legislature? The courts? Also, in reviewing this rewrite of s. 30.08, we need to keep in mind "natural" vs. "artificial," "body of water" vs. "lake" vs. "stream," and "navigable" vs. "navigable in fact."

~~\*\*\*\*NOTE~~ Also, I deleted s. 30.08 (4) <sup>stet</sup> because I did not understand it. Does this mean private entities can determine navigability and then act on the presumption that the water is indeed navigable? Lets talk.

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NOTE: The determination of whether a lake or stream meets the legal standard of navigability is critical, both for the public and for riparian property owners, because it is the means for determining whether a project that affects surface waters is subject to the regulations in subch. II of ch. 30, through the statutory system of permits, contracts and other regulations. It is also critical to determining the property rights of and among riparian owners.

The special committee has determined that public confidence in the regulatory system for navigable waters is being undermined by the lack of a clear, publicly accessible statement of: (1) the legal standard used to determine if streams are navigable; and (2) the various methods that the DNR may use to determine if a particular stream meets the legal standard of navigability.

With respect to the first issue, above, the legal standard for determining if a stream is navigable is currently found in court cases and in a very brief description in s. 30.10. To address the concerns regarding the ability of members of the public to locate the legal standard for navigability of a stream, this bill restates the current test of navigability that is found in court cases and the statutes. In these provisions, the special committee is merely restating and not recommending a change in the legal standard for determining whether a stream is navigable.

With respect to the 2nd issue, above, the methods that the DNR currently uses to determine if a lake or stream is navigable are not currently set forth in any statute or rule. To address the concerns regarding the methods used by DNR to determine if a stream is navigable, this bill proposes a combination of statutes and rules to expressly state the test of navigability. The DNR is required to make its determinations of navigability using, at a minimum, a boat, skiff, or canoe of the shallowest draft used for recreational purposes, with one adult in the boat, skiff, or canoe. This method of determining navigability is the "test" set forth in Wisconsin supreme court cases. The DNR is also directed to promulgate rules (see s. 30.04 (1) in this bill) describing the methods it uses to determine if a lake or stream is navigable. In addition to the test involving actual navigation, the DNR may also use other methods to determine navigability of streams (such as measurements or calculations), so long as those methods predict sufficient water in the stream to allow for actual navigation during periods of high water.

The special committee's objective in recommending this change is to create a test of navigability for streams that will be applied consistently throughout the state by the DNR. For the first time, this will give the test of navigability for streams a clear public statement, a substantial degree of predictability and repeatability and, from the public perspective, a sense of fairness. This test of navigability will lessen the chance for the application of public rights in navigable waters to depend on the choices made by DNR staff regarding the type of watercraft and the amount of weight carried in the watercraft.

The special committee is not recommending a change in the statutes related to the determination of navigability for lakes. The current statutory standard for lakes is "navigable in fact", and does not appear to cause problems. For consistency, the phrase "for any purpose whatsoever" is applied to lakes under this bill, just as that phrase applies to streams under current s. 30.10 (2). The public concerns regarding the test of navigability relate to streams, particularly those at the margins between navigability and nonnavigability.

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The special committee discussed, but chose ~~not to recommend~~, a test of navigability for streams that involves specification of the size and weight of the canoe, paddlers, and cargo, as well as other aspects of the test. Although court cases mention depth of water, and duration of high water, the courts are referring to evidence that supports determinations of navigability, and not to the test of navigability.

The current legal standard of navigability is summarized in Memo No. 4, *Alternatives for Consideration by the Special Committee: The Definition of Navigability and Related Issues* (November 20, 2000). Memo No. 4 discusses the leading case on the navigability of streams, *DeGayner and Co. v. Department of Natural Resources*. The key provisions of the "test" of navigability in *DeGayner* are that navigability of a stream is tested with the shallowest draft boat available for recreational use, such as a kayak or canoe, and that navigability is determined based on the amount of water in the stream during the periodic and recurring spring runoff.

With respect to the depth of the stream, the supreme court noted that evidence had been presented to the trial court in *DeGayner* that canoes and kayaks used for recreational purposes could be floated in as little as 3 inches of water. With respect to the duration of high water, the supreme court cited an earlier case that had found navigability during periodic rises of a stream from 4 to 13 days duration.

However, it is important to understand that these numeric standards were not adopted by the supreme court as part of the "test" for determining whether a stream is navigable. *DeGayner* was the review of a judgment of the circuit court which had sustained the order of the DNR determining that the stream in question was navigable in fact. Conflicting evidence had been presented to the trial court, including testimony by DNR employees that the stream was not navigable. The legal issue in *DeGayner* was whether there was "substantial evidence" in the record to support the DNR determination. The substantial evidence standard for review of agency determinations does not require the court to find that there was a preponderance of evidence to sustain the agency's findings, but rather that the finding was supported by substantial evidence in view of the entire record. Thus, in referring to 3 inches of water and 4 to 13 days of high water, the court was acknowledging evidence that supported the DNR determination. The court's holding in *DeGayner* did not specify how much water must be available, for how long, or even require that the determination of navigability be conducted by means of actual navigation.

The special committee's recommendation continues to allow various other testing methods, and to allow the exercise of discretion and judgment by the DNR. The supreme court has not precluded the use of calculations of water depth and duration, consultation of historic records, or any other method of determining navigability, so long as that evidence relates to the potential for actual navigation.

The special committee acknowledges that the current court test of navigability is based on any form of recreational use of waters for boating. It is not appropriate to make the statutory test overly precise, so as to exclude any common methods of or future developments in recreational boating. The special committee determined that a more precise test of navigability would, in fact, involve a change from current law.

Any determination of navigability using the statutory methods is cast as a presumption, which can be rebutted by other evidence of navigability or nonnavigability. It should be noted that the presumption applies to any determination of navigability or nonnavigability, regardless of who makes the determination. Thus, the presumption could apply in a dispute between riparian owners, in which the navigability or nonnavigability of the stream was at issue.

This bill uses "lake" and "stream" in new s. ~~30.08~~ 30.035 and elsewhere in subch. II of ch. 30. There does not appear to be a pattern in the cases or statutes with respect to these terms. Other terms are used throughout the statutes to describe surface waters, including river, slough, bayou, marsh, pond, spring pond, glacial pothole lake, flowage,

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creek, bay, watercourse, and brook. No legal significance attaches to the use of any of these terms. "Lake" and "stream" are used as collective terms to refer to all such waters.

\*\*\*NOTE: Mark <sup>A</sup> if we go with "body of water," this NOTE must be changed. <sup>keep</sup>

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1 SECTION 39. 30.10 (title) and (1) to (3) of the statutes are repealed.

2 SECTION 40. 30.10 (4) (title) of the statutes is repealed.

3 SECTION 41. 30.10 (4) (a) of the statutes is renumbered 30.213 (2) and amended

4 to read:

30.035 ✓

5 30.213 (2) ~~This section~~ Section ~~30.08~~ does not impair the powers granted by law  
6 under s. ~~30.123~~ sub. (1) or by other law to municipalities to construct highway  
7 bridges, arches, or culverts over streams.

8 SECTION 42. 30.10 (4) (b) of the statutes is renumbered 30.09 and amended to  
9 read:

10 **30.09 Boundaries of lands adjoining waters.** The boundaries of lands  
11 adjoining waters and the rights of the state and of individuals with respect to ~~all such~~  
12 those lands and waters shall be determined in conformity to the common law so far  
13 as applicable, but in the case of a ~~lake or stream~~ body of water erroneously  
14 meandered in the original U.S. government survey, the owner of title to lands  
15 adjoining the meandered ~~lake or stream~~ body of water, as shown on ~~such~~ the original  
16 survey, is conclusively presumed to own to the actual shorelines unless it is first  
17 established in a suit in equity, brought by the U.S. federal government for that  
18 purpose, that the government was in fact defrauded by such survey. If the proper  
19 claims of adjacent owners of riparian lots of lands between meander and actual  
20 shorelines conflict, each shall have his or her proportion of such those shorelands.

21 SECTION 43. 30.10 (4) (c) of the statutes is repealed.

NOTE: The provision regarding farm drainage ditches is relocated to new s. 30.215.

22 SECTION 44. 30.10 (4) (d) of the statutes is renumbered 30.263 (1).

1       **SECTION 45.** 30.103 of the statutes is renumbered 30.325.

2       **SECTION 46.** 30.105 of the statutes is repealed.

NOTE: This provision relates to the method for determining the footage of shoreline for certain specific purposes under ch. 30. The substance of this provision is recreated at several places in this bill where the determination of shoreline footage is part of the statutory procedure.

3       **SECTION 47.** 30.11 (title) of the statutes is renumbered 30.321 (title). *as* *Review above note regarding shoreline footage once the drafts are merged.*

4       **SECTION 48.** 30.11 (1) to (4) of the statutes are renumbered 30.321 (1) to (4) and  
5 amended to read:

6       30.321 (1) ~~WHO~~ MUNICIPALITY MAY ESTABLISH. Any municipality may, subject to  
7 the approval of the department, by ordinance establish or reestablish a bulkhead line  
8 ~~and from time to time reestablish the same~~ along any section of the shore of any body  
9 of navigable waters water within its boundaries.

10       (2) STANDARDS FOR ESTABLISHING. ~~Bulkhead lines shall be established~~ A  
11 municipality shall establish a bulkhead line in the public interest and shall conform  
12 the bulkhead line as nearly as practicable to the existing shores, except that in the  
13 case of leases under sub. (5) and s. 24.39 (4) or 30.343 <sup>✓</sup> the municipality may allow the  
14 ~~bulkhead lines may be approved~~ line to be located farther ~~from~~ beyond the existing  
15 shoreline if ~~they are~~ the line is consistent with and is a part of any lease executed by  
16 the board of commissioners of public lands.

17       (3) ~~HOW ESTABLISHED~~ ESTABLISHMENT OF LINES. ~~Whenever any~~ If a municipality  
18 proposes to establish or reestablish a bulkhead line ~~or to reestablish an existing~~  
19 ~~bulkhead line~~, the municipality shall indicate both the existing shore and the  
20 proposed bulkhead line upon a map and shall file with the department for its  
21 approval 6 copies of the map and 6 copies of the ordinance establishing the bulkhead  
22 line. The map shall use a scale of not less than 100 feet to an inch or any other scale  
23 required by the department. The map and a metes and bounds description of the

bulkhead line shall be prepared by a land surveyor registered in this state. The department may require the installation of permanent reference markers to for the bulkhead line. Upon approval by the department, the municipality shall deliver the map, description, and ordinance to the office of the register of deeds of the county in which the bulkhead line lies, ~~to be recorded by the.~~ The register of deeds shall record the map, description, and ordinance.

(4) RIPARIAN RIGHTS PRESERVED. Establishment of a bulkhead line shall not abridge the riparian rights of riparian ~~proprietors~~ owners. Riparian ~~proprietors~~ owners may place solid structures or fill up to such the bulkhead line.

SECTION #, RP, 30.11 (5) (title)

SECTION 49. 30.11 (5) of the statutes is renumbered 30.343, <sup>(1)</sup> and 30.343 (title)

and (5) (a), as renumbered, are amended to read:

<sup>No (3)</sup> 30.343 (title) ~~Finding Lease of submerged land; finding of public~~  
interest.

<sup>No (1) (5)</sup> Prior to the execution of any lease by the board of commissioners of public lands concerning rights to submerged lands or rights to fill in submerged lands held in trust for the public under s. 24.39, the department shall determine whether the proposed physical changes in the area as a result of the execution of the lease are consistent with the public interest. Thirty days before making its determination, the department shall notify, in writing, ~~the clerk of the county and clerk of the city, village or town in which the changes are proposed~~ each local governmental unit under s. 30.04 (2) and the U.S. Army Corps of Engineers of the application for the lease. In making its finding, the department shall give consideration to all reports submitted to it. The department shall not approve a lease applied for under s. 24.39 (4) (a) 2. if the department determines that the lease may threaten excessive destruction of wildlife habitat.

SECTION #, RN, 30.11 (5) (b) <sup>and C</sup> A (1); 30.343 (2) <sup>and</sup> A (1) 3

SECTION 50. 30.11 (6) of the statutes is renumbered 30.321 (5).

SECTION 51. 30.12 (title) of the statutes is amended to read:

30.12 (title) ~~Structures and deposits in navigable waters prohibited;~~  
~~exceptions; penalty penalties~~  
*Regulation of structures*

SECTION 52. 30.12 (1) (intro.) of the statutes is amended to read:

30.12 (1) ~~GENERAL PROHIBITION PERMIT REQUIRED.~~ (intro.) ~~Except as provided~~  
~~under subs. (4) and (4m), unless~~ *plain space* ~~Unless~~ a permit has been granted by the department  
~~pursuant to statute~~ *or issued authorization has been granted by*  
~~under this section or the legislature has otherwise authorized~~  
~~structures or deposits in navigable waters~~ *score* ~~the deposit or structures, it is unlawful~~  
*no person may* ~~do any of the following:~~

SECTION 53. 30.12 (1) (a) of the statutes is amended to read:

30.12 (1) (a) ~~To deposit~~ Deposit any material or ~~to place~~ any structure upon the  
bed of any navigable water where no bulkhead line has been established; ~~or,~~

SECTION 54. 30.12 (1) (b) of the statutes is amended to read:

30.12 (1) (b) ~~To deposit~~ Deposit any material or ~~to place~~ any structure upon the  
bed of any navigable water beyond a lawfully established bulkhead line.

SECTION 55. 30.12 (1m) of the statutes is created to read:

30.12 (1m) EXCEPTIONS. Subsection (1) does not apply to any of the following:

(a) Activities of the department of transportation carried out in accordance  
with s. 30.341.

*The construction or reconstruction of*  
(b) ~~Highway bridges constructed or reconstructed by municipalities under~~  
~~30.213~~ *to which s. 30.213 applies*

(c) Wharves, piers, and swimming rafts authorized to be constructed and  
placed without a permit under s. 30.13.

(d) Water ski platforms and jumps authorized to be placed without a permit under s. 30.135.

(e) Structures or deposits placed by the Duck Creek Drainage District under s. 30.263.

(f) Structures in the Wolf River and Fox River basins under s. 30.276.

*Marked*  
*Exemptions* \*\*\*\*NOTE: Do we need to add the Lake Belle View project to the list of these exemptions? Municipal bridges? Farm drainage districts? Section 30.122  
*Structures? There may be others.*

SECTION 56. 30.12 (2) of the statutes is repealed and recreated to read:

30.12 (2) PERMITS TO PLACE STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS; GENERALLY. (a) A riparian owner may apply to the department for a permit that is required under sub. (1) in order to place a structure for the owner's use or to deposit any material.

(b) Except for permits for the structures or deposits specified in sub. (3), the notice and hearing provisions of s. 30.245 apply to permit applications that are submitted under this section.

(c) For structures other than those specified in sub. (3), the department shall *issue* ~~grant~~ a permit if the department finds that all of the following apply:

1. The structure will not materially obstruct navigation.
2. The structure will not be detrimental to the public interest.
3. The structure will not materially reduce the flood flow capacity of a stream.

(d) For deposits of materials other than the deposits specified in sub. (3), the department shall *issue* ~~grant~~ a permit if the department finds that all of the following apply:

1. The material will be placed for the purpose of improving habitat or maintaining littoral drift.

- 1           2. The material will not materially obstruct navigation.
- 2           3. The material will not materially reduce the flood flow capacity of a stream.
- 3           4. The deposit of the material will not be detrimental to the public interest.
- 4           5. The deposit of the material will promote public rights and interests in
- 5 navigable waters.

6           (e) The department may promulgate rules that identify structures or  
7 materials, in addition to those identified in subs. (2) and (3) (bn), to which the  
8 permitting requirements under this subsection do not apply. If the department  
9 promulgates such rules, the rules shall include standards governing the placement  
10 of the structures and the depositing of the materials.

11           **SECTION 57.** 30.12 (3) (a) (intro.) of the statutes is repealed and recreated to  
12 read:

13           30.12 (3) (a) (intro.) Unless the department decides to deny a permit as  
14 ~~provided~~ <sup>authored</sup> in par. (b), the department shall ~~grant~~ <sup>issue</sup> a permit to a riparian owner to do  
15 any of the following: ✓

16           **SECTION 58.** 30.12 (3) (a) 9. of the statutes is created to read: INSERT  
23-15

17           30.12 (3) (a) 9. Place an intake or outfall structure that is less than 6 feet from  
18 the water side of the ordinary high-water mark and that is less than 25% of the width  
19 of the channel in which it is placed.

\*\*\*\*NOTE: Mark <sup>Δ</sup>~~X~~ I am having trouble envisioning this. Let's talk.

20           **SECTION 59.** 30.12 (3) (b) of the statutes is repealed and recreated to read:

21           30.12 (3) (b) The department may deny a permit for a structure or deposit  
22 specified in par. (a) if the department finds that any of the following applies:

- 23           1. The structure or deposit will materially obstruct navigation.
- 24           2. The structure or deposit will be detrimental to the public interest.

\*\*\*\*NOTE: I used "obstruct" instead of "impair" since "obstruct" is always used elsewhere in the statutes when conveying this concept.

\*\*\*\*NOTE: ~~MGG~~ *Please review* Review the use of "may" and "shall" in s. 30.12 (2) (c) (intro.) and (d) (intro.) and (3) (a) and (b) (intro.).

1       **SECTION 60.** 30.12 (3) (bn) of the statutes is amended to read:

2       30.12 (3) (bn) A riparian owner is exempt from the permit requirements under  
3       sub. (2) (1) and this subsection for a structure specified under par. (a) 2m. ~~if the~~  
4       ~~riparian owner places the structure in conformance with the standards established~~  
5       ~~under par. (d) and if the riparian owner notifies the department in writing of the~~  
6       location of the structure at least 10 working days before it is placed and places the  
7       structure in conformity with standards established by the department. The  
8       department shall promulgate rules to establish these standards.

9       **SECTION 61.** 30.12 (3) (br) of the statutes is created to read:

10       30.12 (3) (br) The department may promulgate rules that identify structures  
11       or deposits, in addition to those specified in par. (bn) and sub. (2), to which the  
12       permitting requirements under this subsection do not apply. If the department  
13       promulgates such rules, the rules shall include standards and procedures governing  
14       the placement of the structures and the depositing of the materials.

15       **SECTION 62.** 30.12 (3) (bt) (intro.) of the statutes is renumbered 30.276 (intro.)  
16       and amended to read:

17       **30.276 Seawalls; Wolf River and Fox River basins.** (intro.) A riparian  
18       owner is exempt from the permit requirements under sub. (2) ~~and this subsection s.~~  
19       30.12 for a structure that is placed on the bed of a navigable water in the Wolf River  
20       and Fox River basin area, as described in s. ~~30.207~~ 30.223 (1), and that extends  
21       beyond the ordinary high-water mark, if the following conditions apply: